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No. 89-82

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES C. RAYNER,

Petitioner,

v.

DANIEL W. SMIRL

AND

CSX CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does Section 441 of the Federal Railroad Safety Act of 1970, 45 U.S.C. §§431 et seq. provide an exclusive remedy for railroad "whistle-blowing" activities, conferring federal jurisdiction and pre-empting any tort claim for wrongful discharge under State common law?

2. Does the Federal Railroad Safety Act, including the "whistle-blowing" protections of Section 441 apply to supervisory employees?

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STATEMENT OF THE CASE

Petitioner, James C. Rayner, has requested this Court to review the ruling of the United States Court of Appeals for the Fourth Circuit,

affirming the judgment of the United States District Court for the District of Maryland dismissing his state common law "whistle-blowing" claim as preempted by the Federal Rail Safety Act of 1970, 45 U.S.C. §§421-44 ("FRSA").

Petitioner initially filed his Complaint in the Circuit Court for Baltimore City in January, 1988. The Complaint alleged that Rayner was wrongfully discharged for "whistle-blowing" activities by his employer, Respondent CSX Corporation [1] and

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1. The Plaintiff erroneously named CSX Corporation rather than his undisputed employer, CSX Transporation, Inc. in his Complaint. The District Judge inadvertently juxtaposed these parties in Footnote 1 to his Opinion. App.21 n.2. Although this error was again pointed out in the Brief of Appellees to the Court of Appeals for the Fourth Circuit, the error was perpetuated in (footnote continued)

Respondent Daniel Smirl, one of his superiors.

The Respondents removed the action to the United States District Court for the District of Maryland on the ground that Petitioner's state common law claim was preempted by the FRSA and that Plaintiff had asserted a claim under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2011 et seq. The Respondents then moved to dismiss the Complaint, or, in the alternative, for summary judgment, on the ground that, inter alia, the FRSA

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1. (continued) the Opinion of the Court of Appeals, Rayner v. Smirl, et. al., 873 F. 2nd 60 (4th Cir. 1989). The proper party defendant is CSX Transportation, Inc. For purposes of this Opposition, as in all pleadings below, the term "railroad" includes CSX Transportation.

provides Petitioner with a remedy for alleged "whistle-blowing" violations preempting any common law claim for abusive discharge. District Court Judge J. Frederick Motz granted the Motion to Dismiss holding that the state law claim was preempted by FRSA and that Rayner could pursue his remedy with a railroad adjustment board pursuant to FRSA §441(c).

Circuit Judge Wilkinson, in an opinion for a panel which included Chief Judge Ervin and Circuit Judge Murnaghan, affirmed, holding that "the 'whistle-blower' statute, 45 U.S.C. §441, and the comprehensive remedial provisions incorporated therein, 45 U.S.C. §§441(c) & 153, are the railroad employees exclusive remedy and

therefore preempt his state-law claim." App.2.[2/]

ARGUMENT

I. The Decision in This Case Does Not Conflict With The Decision of Another Federal Court of Appeals on the Same Matter, Nor Does it Pose an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.

Supreme Court Rule 17 sets forth the considerations governing review on certiorari, which will be granted "only when there are special and important reasons therefore." The Circuit Court's determination is not in conflict with

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2. Petitioner asserts in his Statement of the Case that as a result of his complaints concerning safety violations, "he became known as a 'whistle-blower'..." Petition For a Writ of Certiorari, p.5. Although Petitioner asserted he had become so known in his Complaint, the Respondents dispute this allegation, and point out that there are no findings to this effect in the record.

any decision of another Federal Court of Appeals on the same matter, Rule 17.1(a), nor does it represent a sufficiently "important question of Federal law which has not been, but should be, settled by this Court." Rule 17.1(c). It is equally clear that there is no conflict with applicable decisions of this Court. Id.

These issues raised are not of sufficient importance as to require this Court's attention because they were decided in accord with legislative intent apparent from the face of the FRSA and well-established principles of preemption established by this Court. Therefore, the Petition for a Writ of Certiorary should be denied.

A. Section 441 of the FRSA is Part of a Comprehensive Legislative Scheme Which Provides a Remedy for Whistle-Blowing Allegations and Totally Preempts State Common Law Wrongful Discharge Claims.

The Court of Appeals and the District Judge properly applied the undisputed, well-established principles of preemption, which occurs when Congress expresses a clear intent to preempt state law when enacting a Federal statute, Jones v. Rath Packing Co., 430 U.S. 519 (1977), where Congress has enacted comprehensive legislation occupying an entire field of regulation leaving no room for supplementation by the States, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), or where state law poses "an obstacle to the accomplishment and execution of the

full objectives of Congress." Hines v. Davidowitz, 312 U.S. 52 (1941). Louisiana Public Service Comm. v. F.C.C., 476 U.S. 355, 368-69 (1986).

To ascertain the congressional intent to preempt, the courts below properly relied upon the express preemption provision of FRSA §434 in which Congress declared on no uncertain terms that:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to enforce any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue to enforce an additional or more stringent law, rule, regulation, order or standard relat-

> ing to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

Petitioner's argument that this sweeping declaration of congressional intent is limited only to the establishment of "safety rules and standards" was properly rejected by the courts below. By its express terms, the FRSA preemption provision applies to "laws, rules, regulations, orders, and standards relating to railroad safety." 45 U.S.C. §434 (emphasis added), App. 15. It is equally clear that from its inclusion in the Federal Rail Safety Act that the Congress intended Section 441 to be a safety provision. This directly refutes Petitioner's attempt

to mischaracterize Section 441 as a matter of "employee-employer relations." Section 441 protects railroad employees who report safety violations, thereby furthering the purpose of the Act to reduce injuries to persons and damaged property caused by railroad accidents. See 45 U.S.C. §421.; H.R. Rep. No. 91-1194, 91 St Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4113.

In Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n., 536 F.Supp. 653 (E.D.Pa. 1982), Aff'd. Mem., 696 F.2d 981 (3rd Cir. 1982), Aff'd. Mem., 461 U.S. 912 (1983) the holding that the FRSA is totally pre-emptive was affirmed, by memorandum, by the Supreme Court of the United States. E.g., Donelon v. New Orleans Terminal Co.,

474 F.2d 1108 (5th Cir. 1973). Under these cases addressing the pre-emptory intent and nature of the FRSA, the fact that Congress expressly addressed the subject matter of whistle-blowing in §441 is sufficient to demonstrate the requisite pre-emptive intent of the FRSA.

Moreover, if the fifty states were permitted to impose their own, case-by-case standards to whistle-blowing allegations, it would be impossible to achieve the national uniformity sought by Congress when it enacted the FRSA. In its opinion below the Court of Appeals explained the integral relationship between such "whistle-blowing" allegations and the FRSA:

> In addition, Congress' desire for national uniformity in railroad safety practices clearly is

> implicated by Rayner's common law claims. In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistle-blowing" is inextricably tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistle-blowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley or jury determinations, which Congress, in its quest for national uniformity under §434, sought to avoid.

App. 15.

Hence, Section 441 constitutes a "comprehensive remedial scheme for aggrieved railroad employees," confirming its preemptive scope. App. 13. Congress has included an express procedure for asserted "whistle-blowing" violations and has set forth specific

remedies for wrongfully discharged or demoted employees. 45 U.S.C. §441(c)(2). By providing this specific remedial scheme, Congress demonstrated its intent that the FRSA remedy for railroad "whistle-blowers" be exclusive. Cf., Pilot Life v. Dedeaux, 481 U.S. 41, 52-56 (1987).

The fact that subsection (d) of §441 provides for election of remedies does not alter this analysis. That provision states that "whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must either seek relief pursuant to this section or pursuant to such other

provision of law." (emphasis supplied). The legislative history of this provision demonstrates that Congress intended to preserve existing remedies under existing Federal statutes including the Railway Labor Act. Section 441 was not intended to displace the protections and remedies already accorded many railroad employees under the contractual and grievance procedures of the Railway Labor Act. "The Committee understands that rail employees already receive similar protection, [as provided under §441(a) and (b)], along with back pay, through the grievance procedure. The Committee does not intend to alter the existing protection, but rather to put the prohibition of discrimination into

statutory form." 1980 U.S. Code Cong. and Adm. News, p. 3840.

The House Committee Report also stated that the Committee intended that the procedural mechanisms established in §3 of the Railway Labor Act "be the exclusive means for enforcing this section" (emphasis supplied). The Committee even precluded FRA involvement in this area.

This statement of congressional intent refers to the entire scheme provided in Section 441. It provides additional evidence that by including the election of remedies provision in subsection (d) Congress was merely preserving existing rights of those employees who already possessed such protections through the grievance procedure of the Railway Labor Act.

Moreover, the Statement of Representative Florio, to which Petitioner adverts, lends further support to this interpretation:

> "We also agreed to a provision clarifying the relationship between the remedy provided here and the possible separate remedy under O.S.H.A. Certain railroad employees such as employees working in shops, could qualify for both the new remedy provided in this legislation, or an existing remedy under O.S.H.A. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results."

126 Cong. Rec. H26532 (Daily Ed. Sept. 22, 1980) Statement of Rep. Florio.

Indeed, another portion of that very statement by Rep. Florio demonstrates the conflict with express congressional intent that would occur if Petitioner were to prevail. This

entire case represents a transparent attempt by Petitioner to circumvent the congressionally prescribed remedy for similarly aggrieved railroad employees. Petitioner sought punitive damages in his Complaint, and the FRSA limits his remedy to reinstatement with back pay. Rep. Florio explained that the original committee bill had authorized the grievance board to award exemplary damages to employees in addition to back pay, but "this was a controversial proposal and was dropped as part of our compromise with the Senate." Id. at 26531. Hence, permitting the States to impose exemplary damages for whistle-blowing violations would directly conflict with the express intent of Congress in this matter.

B. An At-Will Supervisor Is An "Employee" Within The Meaning Of The FRSA.

Petitioner also argues that he is not subject to the protections of §441 because as a railroad supervisor, he is not working under a collective bargaining agreement. This argument is without merit because, as a remedial safety statute, the term "employee" as used in Section 441(a) is to be broadly construed. See e.g., 29 U.S.C. §652(6) ("employee" defined under the Occupational Safety and Health Act); Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980)(Safety legislation to be liberally construed to effectuate congressional purpose); Boston & Maine Corp. v. Lenfest, 779 F.2nd, 795, 799 (1st Cir. 1986), cert. denied 107 S.Ct. 458 (1987).

As the Court of Appeals explained:

> The fact that Rayner was a railroad supervisor does not mean that the Board is without jurisdiction in his case. Rayner, in fact, misconstrued the relationship between the FRSA and the Railway Labor Act. The FRSA's incorporation of the Railway Labor Act in §441 is limited to the RLA's dispute resolution procedures. 45 U.S.C. §441(c). The FRSA borrows the administrative complaint procedures of the National Railroad Adjustment Board, but not its definition of employee or necessarily its jurisdictional limitations. Congress intended the FRSA to promote the safety of all those working in the national rail system. A more inclusive definition of employee is therefore warranted."

App. 8-9 (emphasis in original).

Petitioner's argument that he might not receive a fair hearing because the Railroad Adjustment Board is comprised of an equal number of representatives appointed by management and by unions

is specious. In the event of a deadlock, the Board panel agrees upon a neutral arbitrator to resolve the issue. 45 U.S.C. §153 First (1). The Board mechanism was selected by Congress because such a Board provides the specialized expertise necessary to make just determinations in such matters. Moreover, while a part of management, Petitioner at all times retained his union membership and seniority and is now in a contract position. Thus, Petitioner's argument must fail, according to well-established principles of statutory construction contained in the express language of Section 441.

CONCLUSION

Wherefore, for the reasons set forth above, the ruling of the United States Court of Appeals for the Fourth

Circuit is not in error, and this case should not be the subject of this Court's discretionary writ.

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